APPENDIX A

Memorandum of Decision
Filed Feb. 20, 1967

Civil Action No. 65 C 609

THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY,
THE BALTIMORE AND OHIO RAILROAD COMPANY,
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,
INDIANA HARBOR BELT RAILROAD COMPANY,
THE NEW YORK CENTRAL RAILROAD COMPANY,

Plaintiffs,

v.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION,

Defendants,

and

ATCHISON, TOPEKA AND SANTA FE, ET AL.

Intervening Defendants.

This is a suit to set aside an order of the Interstate Commerce Commission which required the cancellation of certain tariff provisions[1] which had been proposed by the plaintiffs in this action.

[1] The Commission report is published at 322 I.C.C. 565.

The plaintiffs Baltimore and Ohio Chicago Terminal and the Indiana Harbor Belt Railroad Company are switching or terminal carriers within the Chicago switching district.

The remaining three plaintiffs are line-haul or road-haul carriers whose lines connect with the Chicago Switching District. They are the Baltimore and Ohio Railroad Company, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and the New York Central Railroad Company. These three plaintiffs control the two plaintiff switching carriers.

The current controversy revolves around the payment of so-called "mileage allowances." Owners of specified types of rail cars, usually those which are shipper-owned or shipper-controlled, are entitled to an allowance from the rail lines for all the miles their cars are used. At some districts there are bilateral agreements in force by which road-haul carriers pay the mileage allowance for the miles the cars travel over the tracks owned by the switching carriers. The Harbor Belt and the Chicago Terminal, however, have always paid the mileage allowance to the car owners on movements within the Chicago Switching District.

By schedules filed to become effective in 1963, the Harbor Belt and the Chicago Terminal proposed to cancel tariff provisions authorizing the payment of mileage allowances on certain movements within the Chicago Switching District. Simultaneously, the three

road-haul plaintiffs in this action proposed to pay, when any of the three received a line-haul movement, the mileage allowance which the two terminal carriers proposed not to pay.

These tariffs became effective on February 14, 1964. Additional line-haul carriers published tariffs which became effective three days later, assuming the obligation to pay the mileage allowances on their movements through the Chicago Switching District. These tariffs were established for competitive reasons pending determination of the proceedings before the Interstate Commerce Commission.

All five plaintiffs in the action before this court were respondents in the proceeding before the ICC. The only respondent to offer any evidence, however, was the Harbor Belt.

The Commission found that the effect of the tariff schedules proposed by the plaintiffs would be to deny the payment of mileage allowances for distances private cars move over the Harbor Belt and Chicago Terminal lines, except when moving to or from these lines via the Baltimore & Ohio, New York Central or Milwaukee roads, or for intra or inter terminal switching movements.

The Commission held that the proposal of the switching carriers was in derogation of their obligation to pay mileage allowances and that this practice violated Section 1 (6) of the Interstate Commerce Act (49

USC 1 (6)).[2] The ultimate finding of the Commission was that the proposed schedules were not shown to be just and reasonable. The schedules were ordered cancelled.

The Harbor Belt's and the Chicago Terminal's joint petition for reconsideration was denied by order of the Commission, Division 2, acting as an Appellate Division. The plaintiffs then filed this suit to set aside the Commission order. The court entered an order staying the operation of the Commission orders until hearing and determination by a statutory court composed of three judges as required by Title 28 USC Section 2284.

Intervening as defendants in support of the ICC in this action are the American Refrigerator Transit

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[2] It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter and upon just and reasonable terms, and every unjust and unreasonable classification, regulation and practice is prohibited and declared to be unlawful.

Company and ten road-haul railroads[3] that connect with the Harbor Belt and Chicago Terminal. The intervening railroad defendants are competitors of the three plaintiff connecting carriers.

The plaintiffs concede that shippers or car leasing companies that furnish freight cars used in performing transportation services are entitled to be paid a mileage allowance. They contend, however, that the Harbor Belt and Chicago Terminal need not pay these allowances if the obligation is met collectively by the railroad industry. The plaintiffs insist that competitive pressures will force other road haul carriers to pay the mileage allowance on movements within the Chicago Switching District. In other words, the argument is that shippers owning private cars entitled to the mileage allowances would divert traffic from those carriers that refuse to compensate them for the use of these cars in the Switching District.

The plaintiffs further contend that the dispute before the Commission involved only a dispute between railroads, and that the Commission therefore erred in

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[3] Atchison, Topeka and Santa Fe Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago Great Western Railway Company
Chicago and North Western Railway Company
Chicago, Rock Island & Pacific Railroad Company
Erie-Lackawanna Railroad Company
Grand Trunk Western Railroad Company
Illinois Central Railroad Company
Norfolk and Western Railway Company
Soo Line Railroad Company

basing its decision on Section 1 (6) of the ICC act. *Baltimore and Ohio Railroad Co.* v. *United States*, 277 U.S. 291, 300 (1928).

On the other hand, if this controversy involves more than just a dispute between railroads, and can be said to "affect arbitrarily and unreasonably the purse of the shipper,"[4] then the Commission was justified in relying on Section 1 (6).

This court is of the opinion that the shippers are sufficiently interested in receiving their rent promptly to justify the Commission in deciding that Section 1 (6) covered this case. The resolution of the controversy does affect shippers. The shippers' relationship with their lessees already had been disturbed in the three day period that elapsed between the time the plaintiffs' proposed schedules became effective and the time that additional line-haul carriers amended their tariff provisions. The Elgin, Joliet & Eastern, a connecting line-haul carrier with the Harbor Belt, did not file any protective tariff prior to the Commission hearings. Although the amount of the Elgin's mileage allowance payment would be seemingly inconsequential, its failure to respond does indicate that the logic of the petitioners' competitive pressure argument is not as inexorable as they would have this court believe. In the future it is possible there will be further disturbances. The Commission found that "the Harbor Belt's

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[4] *Northern Pacific* v. *United States*, 41 F. Supp. 439, 443.

line-haul connections are opposed to paying these allowances and will not agree permanently to assume their payment." If the Milwaukee Road, one of the plaintiffs in this action, should find the mileage allowances burdensome it could discontinue their payment and all of its competing carriers have indicated they then will discontinue their payments. It is conceded that the shippers have a statutory right to be paid. They should not be asked to accept in substitution of such a right a marketplace situation which may or may not have the effect of coercing the connecting railroads to pay the mileage allowance. The Commission properly found therefore that the dispute did involve the rights of shippers.

Section 15 (7) of the I.C.C. Act (49 USC 15 (7)) places the burden of proof on the carrier in a rate proceeding, or in a proceeding in the nature of a rate proceeding, to justify a proposed schedule as just and reasonable. This court is satisfied that the petitioners introduced no persuasive evidence and that the Commission's finding that there was no showing that the proposed schedules were just and reasonable is fully justified.

The plaintiff Harbor Belt was the only respondent before the Commission to offer any evidence. This plaintiff is owned by the Milwaukee and New York Central, but it is independently operated. Nearly 35 per cent of its overhead traffic is perishable in nature. Since perishables usually move in refrigerator cars subject to mileage allowances, the Belt presently pays

no mileage allowances on a large part of its traffic. From 1921 through 1958 the Harbor Belt operated at a profit in all but three years. From 1959 through 1962, the period considered by the Commission, the Belt lost more than $5,000,000.

This deficit was not sufficient justification to cancel the tariff inasmuch as the Commission found that this deficit was not attributable to the payment of the mileage rent, but reflected the Harbor Belt's overall operation.

Nor can the tariffs be justified on the grounds that line-haul carriers have assumed the payment of mileage allowances for switching lines at terminals in Kansas City, St. Louis, Peoria, and Cincinnati. In those areas the railroads entered into voluntary agreements. Here all connecting railroads—with the exception of the three road-haul plaintiffs who would not be put in a different position by absorbing the mileage allowances[5]—are objecting to the proposal.

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[5] Mr. Sullivan, representing the Harbor Belt, the only plaintiff which appeared and introduced evidence before the I.C.C. responded to questions on cross-examination as follows: (Page 49 of the transcript of the Commission proceedings.)

Q. (By Mr. Sheil) Those three roads you just mentioned—the B & O, New York Central, and the Milwaukee, they are owners or part owners of the respondent in this case?

A. No: the B & O is not a part owner of IHB.

Q. But it is of the B & OCT?

A. It is of the B & OCT.

Q. Then, in effect, by absorbing this car mileage allowance, these roads are in no different position?

A. That is probably true.

In summary, it is the opinion of the court that the Commisision did not err in applying Section 1(6) under the circumstances present in this case; and on the question of fact the record justified the finding that petitioners had not shouldered their burden to show the tariffs are just and reasonable.

JUDGMENT

This cause coming before the duly constituted three-judge court, consisting of Circuit Judge Roger J. Kiley, District Judge Julius J. Hoffman and District Judge William J. Lynch;

IT IS ORDERED AND ADJUDGED that the order of the Interstate Commerce Commission is approved, and the action is dismissed on the merits, with prejudice;

IT IS FURTHER ORDERED that the temporary restraining order entered on April 30, 1965, be, and the same is hereby dissolved.

ENTER:

Roger J. Kiley
ROGER J. KILEY
Judge of the Circuit Court

Julius J. Hoffman
JULIUS J. HOFFMAN
Judge of the U. S. District Court

William J. Lynch
WILLIAM J. LYNCH
Judge of the U. S. District Court

Dated this 20th day of February, 1967

APPENDIX B

Served May 18, 1964

30156

INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 7980
CANCELLATION OF PRIVATE CAR
ALLOWANCES ON B&O CT AND IHB

Decided May 6, 1964

Proposed cancellation of tariff provisions authorizing payment of mileage allowances, on privately owned, leased, or rail-owned cars subject to mileage tariffs, when such cars are moving over the lines of the Indiana Harbor Belt Railroad or the Baltimore & Ohio Chicago Terminal R. Co., found not shown to be just and reasonable. Schedules ordered canceled.

R. J. Murphy for respondents.
W. B. Fisher for intervener supporting respondents.

Eugene D. Anderson, Paul P. Borsik, Benson T. Buck, J. A. Christiansen, J. T. Clark, W. M. Conrad, Robert S. Davis, Abraham A. Diamond, Kemper A. Dobbins, John H. Doeringer, Robert H. Duesenberg, Edward R. Gustafson, E. B. LaLonde, William C.

McLaughlin, C. Harold Peterson, James F. Schouman, Theus J. Sheil, Louis R. Simpson, Albert T. Suter, Frank J. Sweeney, Archie T. Walters, and *John P. Zumwalt* for protestants and interveners supporting protestants.

REPORT AND ORDER OF THE COMMISSION
DIVISION 2, COMMISSIONERS FREAS, WEBB, AND BUSH

BUSH, *Commissioner*:

Due and timely execution of our functions under section 15(7) of the Interstate Commerce Act imperatively requires the omission of a recommended report and order in this proceeding. Requested findings not discussed in this report nor reflected in our findings or conclusions have, nevertheless, been considered and found not justified.

By schedules filed to become effective July 1, 1963, the respondents[1] proposed to cancel tariff provisions authorizing the payment of mileage allowances[2] on privately owned railroad cars, on cars leased by shippers, and on certain foreign line railroad cars made subject to the applicable mileage allowance tariff,[3] when

[1] Indiana Harbor Belt Railroad Company and The Baltimore and Ohio Chicago Terminal Railroad Company, referred to hereinafter as Harbor Belt and Chicago Terminal, respectively.

[2] Mileage allowances are compensation paid by rail lines to the owners of special types of usually nonrailroad owned rail cars. This compensation is based on stated amounts per mile of travel.

[3] Agent Hinsch's I.C.C. No. H-9.

such cars, loaded or empty, move over the lines of the Harbor Belt or the Chicago Terminal on bridge traffic or on interchange traffic, excluding traffic local to the Harbor Belt or to the Chicago Terminal. Simultaneously, the Baltimore and Ohio Railroad Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and the New York Central Railroad Company,[4] proposed to pay, when any of the three received a line-haul movement, the aforementioned mileage allowances which the two terminal carriers propose not to pay. Following protests, operation of the proposed schedules was suspended through January 31, 1964, and was voluntarily postponed by respondents to and through February 14, 1964, after which they became effective. To become effective 3 days later and under special permission authority 17 additional line-haul carriers amended the suspended tariff provisions to expire with May 14, 1964. The amendment was established for competitive reasons pending determination of this proceeding and providing that these carriers also would pay mileage allowances for movements over the Harbor Belt and the Chicago Terminal. At this writing an application to extend the expiration date for another 3 months has been received.

At the hearing a special appearance was entered for Chicago Terminal only to state that no evidence would

[4]Also respondents. No appearances were entered for Baltimore & Ohio or for the New York Central, and no evidence was offered on behalf of the Milwaukee.

be presented by that respondent in support of its proposal but that such respondent wants the schedules to become effective for its account.

On brief, intervener Illinois Central Railroad moved for a further hearing to introduce new evidence "to the extent the Commission would give any weight to the IHB's (Indiana Harbor Belt) deficit plea." In view of the ultimate conclusion herein, no purpose would be served by further hearing. The motion is denied.

The Harbor Belt is a switching road operating in the Chicago switching district. It handles overhead switching for 28 line-haul carriers, renders terminal switching service on traffic to and from Chicago, and handles intra and interterminal traffic in the Chicago switching district. Although independently operated, it is owned by the Milwaukee and New York Central Railroad companies. It has several yards and serves about 600 shippers.

One of its more important facilities is the icing station at Blue Island yard. Nearly 35 percent of its overhead traffic is perishable in nature. Since perishables usually move in refrigerator cars subject to mileage allowances, the Harbor Belt presently pays mileage allowances on a large part of its traffic.

The Harbor Belt has lost money in each of the 4 calendar years 1959 through 1962. The total deficit for those years was $5,592,861 before Federal tax or tax

adjustments. After Federal tax adjustments the deficits totaled $5,335,299. For the years 1921 through 1958, the road earned a profit in each year except 1945, 1946, and 1947.

The following table shows the deficits after Federal tax adjustments, the mileage payments, and the percentage relationship of deficits and mileage payments.

TABLE I.—*Relationship of mileage payments to deficits*

Year	Deficit	Mileage payments	Percentage[1]
1959	$542,595	$612,113	112.8
1960	2,480,762	615,246	24.8
1961	950,571	557,562	58.7
1962	1,361,371	459,224	33.7

[1] Mileage payments divided by deficit.

These data indicate a decrease in the amounts paid as mileage allowances, and a fluctuating deficit. The deficits are of recent origin and during that period increased mileage allowances have been in effect.

The following table shows a breakdown, by classes of cars, of the mileage allowances paid by Harbor Belt.

TABLE II.—*Mileage payments by classes of cars*

Year	Tank cars	Refrigerator cars	Other cars
1959	$105,441	$498,625	$8,047
1960	110,386	495,394	9,466
1961	109,485	437,833	10,244
1962	105,298	342,069	11,859
Total	$430,610	$1,773,921	$39,616
Percentage[1]	19.18	79.05	1.77

[1] Total, all cars, $2,244,147.

The significant figure here is the large percentage of mileage payments on refrigerator cars. About 35 percent of Harbor Belt's overhead[5] traffic is in refrigerator cars.

By agreement, line-haul carriers have assumed payment of mileage allowances, in some instances, for some switching lines at other terminals. For example, the Terminal Railroad Association of St. Louis is a switching carrier which connects with 22 line-haul carriers in the St. Louis switching district. It operates an icing facility similar to the Harbor Belt's Blue Island facility. Mileage allowances for movement of mileage cars over the rails of the Terminal Association are paid by the line-haul carriers when the movements are other than intra or interterminal movements within the St. Louis switching district (on intermediate or terminal service for line-haul carriers). Similar arrangements are in effect at Kansas City, Mo., Peoria, Ill., and Cincinnati, Ohio.

With the exceptions noted, the Harbor Belt's line-haul connections are opposed to paying these allowances and will not agree permanently to assume their payment. When the question was referred to the Committee on Car Service of the American Association of Railroads, that body declined to act on the ground that the matter was local to the Chicago switching district.

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[5] Cars received from connecting carriers and delivered to connecting carriers as distinguished from traffic originated or terminated on the Harbor Belt.

Protestants fall generally into four basic groups. The car leasing companies rely on mileage allowances as their only source of revenue. Several large shippers own or acquire cars through long term lease. Some railroads buy and make certain types of cars subject to mileage allowances. Connecting railroads, with some exceptions, oppose the proposal. The car leasing companies own special types of rail cars. These are leased to shippers, many on a minimum guaranteed monthly rental. The lessee pays a minimum rental a month in advance. As the car moves over rail lines, the railroads pay to the lessor the applicable mileage allowances for both loaded and empty movements. The lessor receives interchange reports from the various carriers as a check on the mileage each car moves. The allowances paid by the railroads to the lessor are credited to the lessee's account, up to the amount of the guaranteed monthly rental. Any amounts earned by such cars in excess of the guaranteed monthly rental are retained by the car leasing company. If a car does not earn sufficient allowances to cover the guarantee, the lessee assumes the difference. The accounts are adjusted each month. The car leasing companies oppose the proposal because they will lose the revenues they normally receive when mileage cars move over the lines of the respondents. Their objectives would be met, however, if the line-haul car-

riers would pay, to the leasing companies, the mileage allowances now being paid by the respondents. The shippers which own mileage cars or operate such cars under lease, oppose the proposal for the same reasons. The connecting line-haul carriers fear they will have to pay the allowances in lieu of the respondents or lose the traffic on which they receive a line-haul movement to those carriers which propose to pay the allowances respondents seek to avoid.

Shipments moving in refrigerator cars from the west, through Chicago, to the east generally move over the Harbor Belt because many western lines do not have re-icing facilities in Chicago. Should the proposal become effective, efforts will be made to route traffic over direct connections between western and eastern lines or to divert traffic to the Milwaukee, New York Central, or Baltimore & Ohio lines which would assume payment of the mileage allowances respondents seek to eliminate.

Table III shows the mileage allowances paid by the Harbor Belt to its connecting carriers, and reflect the amounts the latter carriers would pay if they assumed the mileage payments.

TABLE III

Carrier (popular titles)	Amount	Percentages[1]
	Column 1	*Column* 2
Santa Fe	$1,457	4.0
Baltimore & Ohio	707	1.9
Chicago & Eastern Illinois	196	0.5
Chicago & North Western	4,226	11.6
Chesapeake & Ohio	770	2.1
Chicago, Burlington & Quincy	2,665	7.2
Milwaukee	6,507	17.8
Chicago, Great Western	848	2.3
Rock Island	1,136	3.1
Chicago, South Shore	87	0.2
Elgin Joliet & Eastern	11	0.0
Erie	1,840	5.0
Gulf, Mobile & Ohio	559	1.5
Grand Trunk Western	539	1.5
Illinois Central	2,695	7.4
Illinois Northern	85	0.2
Monon	153	0.4
New York Central	6,225	17.0
Nickel Plate	2,279	6.2
Pennsylvania	2,314	6.3
Soo Line	744	2.0
Wabash	615	1.7
Totals	36,658	99.9

[1] Percentages of figures in column 1 to total.

The above data is based on a study of the cars handled on the Harbor Belt in June 1963. The two lines which own the Harbor Belt have by tariff provisions proposed to absorb portions of the mileage allowances now borne by the Harbor Belt. To the extent that the allowances now contribute to the deficits of the latter

carrier, the two owning lines now bear the brunt of the Harbor Belt's deficits. The owning lines hope that competitive forces will permit them to escape liability for some portion of the burden they now carry and transfer it to other connections of the Harbor Belt. The deficits cannot be attributed in whole or in part directly to the payment of mileage allowances, but are the reflection of the entire operations of the Harbor Belt.

DISCUSSION AND CONCLUSIONS

Ordinarily, railroads must furnish cars to transport traffic offered to them. Should the shipper, by owning or through car-leasing companies, furnish special equipment, the railroads must pay a reasonable amount for their use of such transportation facilities.[6] Collectively, the railroads cannot escape this obligation. In some similar situations at other terminals, line-haul carriers have assumed the burden of relieving switching or terminal carriers of their pro rata share of the cost of car ownership by agreeing to pay allowances for the miles allowance cars move over terminal or switching lines.

The effect of the tariff schedules is to deny the payment of mileage allowances for distances private cars move over the respondents' lines, except when moving to or from respondents' lines via the Baltimore &

[6] *Paragon Refining Co.* v. *Alton & S. R.*, 118 I.C.C. 166, 167.

Ohio, New York Central, or Milwaukee roads or for intra or interterminal switching movements. Thus, on many of the mileage allowance cars[7] no allowances would be paid. The law clearly requires that amounts to be retained by the railroads rendering service shall reflect their use of cars furnished by others.[8] The justification submitted is that no other switching carriers except those in the Chicago area are required to bear mileage allowances and that the Harbor Belt is losing money on its operations. The latter argues that the line-haul carriers will be forced to assume the payment of these mileage allowances, because of competition for the traffic.

It is contended that it is an unreasonable practice for respondents' connections to require switching carriers in the Chicago terminal area to pay mileage allowances when switching lines in other terminal areas do not pay such allowances. This, however, is basically an argument between carriers as to which carriers are to pay the allowances. Section 1(6) has been construed to apply only to charges levied upon the public. *Northern Pac. Ry. Co.* v. *United States,* 41 F. Supp. 439, 443. In this respect the actions complained of do not constitute a "practice" within the meaning of section 1(6).

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[7] Some 63 percent from the best evidence available (Table III).

[8] *El Dorado Oil Works* v. *United States,* 328 U.S. 12, 15.

The proposal, insofar as it would result in no mileage allowance payments to car owners, would reduce the compensation for mileage cars and would, in many instances, require the owners to accept lesser compensation for furnished facilities which the respondents are obligated to furnish. On leased cars, the shippers would, in some instances, be compelled to make larger payments to meet guaranteed minimum rental agreements. The proposal of the switching lines is in derogation of their obligation to pay mileage allowances. This practice is violative of section 1(6).

We find that the proposed schedules are not shown to be just and reasonable.

VICE CHAIRMAN WEBB dissents.

It is ordered, That the respondents be, and they are hereby, notified and required to cancel, on or before June 26, 1964, the schedules described in the order of the Commission's Board of Suspension, entered on June 26, 1963, upon not less than one day's notice to the Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and that this proceeding be, and it is hereby, discontinued.

By the Commission, division 2.

HAROLD D. MCCOY
Secretary

(SEAL)

APPENDIX C

SECTION 1(6) OF INTERSTATE COMMERCE ACT [49 U. S. C. § 1(6)]

(6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.